MOTION FILED
OCT 15 1986

(3)

No. 86-358

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Appellants,
v.
HENRY C. GRAY, DIRECTOR, ARKANSAS HIGHWAY AND TRANSPORTATION DEPARTMENT, *et al.*,
Appellees.

On Appeal from the Supreme Court of Arkansas

MOTION OF YELLOW FREIGHT SYSTEM, INC., NORTH AMERICAN VAN LINES, INC., AND B. I. TRANSPORTATION, INC. FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND BRIEF AS AMICI CURIAE IN SUPPORT OF APPELLANTS' REQUEST THAT PROBABLE JURISDICTION BE NOTED

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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To The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Pursuant to Rule 42 of the Rules of this Court, Yellow Freight System, Inc. ("Yellow"), North American Van Lines, Inc. ("North American"), and B. I. Transportation, Inc. ("B. I.") respectfully move for leave to file the accompanying brief as *amici curiae*. Appellants have consented to the filing of this brief; appellees have not.

INTEREST OF YELLOW, NORTH AMERICAN, AND B. I.

This appeal presents the question whether state highway use taxes that impose a substantially higher effective tax rate on trucks registered outside the taxing State than on trucks registered in it discriminate against interstate commerce in violation of the Commerce Clause of the United States Constitution. The three interstate motor carriers seeking to file the accompanying brief as *amici curiae* are subject to the challenged tax—Arkansas' annual $175-per-truck/5¢-per-mile highway use equalization tax—and to similar highway use taxes imposed by other states. As a victim of the discrimination inflicted by these taxes, each carrier has a direct and substantial interest in this appeal.

This Court has long held that in reviewing a Commerce Clause challenge to a state tax, it is "not the tax in a vacuum of words, but its practical consequences for the doing of interstate commerce in applications to concrete facts [that] are our concern." *Nippert v. Richmond*, 327 U.S. 416, 431 (1946). Yellow, North American, and B. I. have firsthand experience with the practical effects of discriminatory state highway taxes, and can describe in concrete dollars and cents terms the cumulative burden imposed by such taxes on interstate motor carriers. The continuing spread of non-mileage proportioned highway taxes (adopted by seven states since 1980) and their discriminatory impact on thousands of interstate motor carriers warrants this Court granting full review of the issues raised in this appeal.

Yellow, North American, and B. I. therefore move for leave to file the accompanying brief as *amici curiae*.

Respectfully submitted,

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Pursuant to Rule 36 of the Rules of this Court, Yellow Freight System, Inc., North American Van Lines, Inc., and B. I. Transportation, Inc. respectfully submit this brief as *amici curiae* in support of appellants' request that probable jurisdiction be noted.

INTEREST OF THE AMICI CURIAE

The interest of Yellow, North American, and B. I. in this matter is set forth in the accompanying Motion for Leave to File Brief as Amici Curiae.

STATEMENT

The Arkansas highway use equalization ("HUE") tax and similar discriminatory taxes imposed by other states adversely affect the entire interstate motor carrier industry. That industry comprises hundreds of thousands of businesses, ranging from single truck owner-operators to major companies that operate several thousand trucks each. Trucking firms are either "for-hire" carriers or "private" carriers. For-hire carriers transport other people's freight for compensation, while private carriers (manufacturers, merchants, and others) transport their own goods. Together, the two types of carriers utilize over 1.5 million trucks to haul goods approximately 46.5 billion miles interstate each year.[1] Truck transportation is critical to almost every other line of interstate commerce, and ultimately to the livelihoods and leisure activities of virtually all Americans.

The three interstate carrier *amici* represent a cross-section of this major industry. *Amicus* Yellow Freight System, Inc. ("Yellow"), based in Overland Park, Kansas, is one of the largest of the over 32,000 interstate for-hire motor carriers regulated by the Interstate Commerce Commission ("ICC"). 1984 I.C.C. Ann. Rep. Appendix E, Table 1. Yellow transports less-than-truckload shipments of general commodities throughout the United States and parts of Canada using 533 terminals (points of consolidation and distribution). In 1985, Yellow employed over 3,000 trucks to haul freight some 417 million miles interstate. Yellow Freight System, Inc., 1985 Annual Report M to the ICC, Schedule 720, Line 11b; Schedule 730, Line 6b.

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[1] The U.S. Department of Commerce Bureau of the Census' 1982 CENSUS OF TRANSPORTATION, TRUCK INVENTORY & USE SURVEY indicates that for-hire carriers annually operate approximately 650,000 trucks in nearly 30 billion miles of interstate operations (p. 8, Table 2) while private carriers annually operate approximately 800,000 trucks (p. 33, Table 6) in over 16.5 billion miles of long range transportation (p. 90, Table 12).

Amicus North American Van Lines, Inc. ("NAVL"), headquartered in Fort Wayne, Indiana, is a leading household goods carrier (moving company), as well as a regulated common carrier of general commodities. NAVL is thus representative of both specialty carriers (including tank truck carriers, automobile transporters, and others) and general freight carriers. NAVL's household goods division operates approximately 1,500 leased truck tractors throughout the country. Together with NAVL's general freight fleet, these trucks travel approximately 403 million miles in interstate commerce annually. North American Van Lines, Inc., 1985 Annual Report M to the ICC, Schedule 720, Line 11b; Schedule 722, Line 22.

Amicus B. I. Transportation, Inc. ("B. I."), based in Burlington, North Carolina, is the transportation arm of Burlington Industries, a major textile manufacturer. Utilizing approximately 345 trucks, B. I. transports Burlington's products nationwide. Its fleet travels approximately 41.5 million interstate miles annually. B. I. is representative of the nation's over 119,000 private motor carriers. *See* C. A. TAFT, COMMERCIAL MOTOR TRANSPORTATION 7 (1986). Those carriers use over 800,000 trucks to conduct more than 16.5 billion miles of long range operations annually. *See* Footnote 1, *supra.*

Competition in the interstate trucking industry has increased significantly since passage of the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793-826. Over 12,000 new interstate operations have been granted broad, unencumbered authority by the ICC. 1984 I.C.C. Ann. Rep. 50. The ICC has noted that there is now "vigorous price competition in the trucking industry" (*see Lawfulness of Volume Discount Rates—Motor Common Carrier of Property*, 365 I.C.C. 711, 714 (1982)), which greatly limits carriers' ability to set rates high enough to offset discriminatory state taxes.. In fact, the trucking industry's net income every year since 1978 has been below 3 percent of operating revenues, and in 1985, 33

percent of the carriers operated at a loss. AMERICAN TRUCKING ASSOCIATIONS, INC., FINANCIAL & OPERATING STATISTICS, MOTOR CARRIER ANNUAL REPORT (1978-85 eds.) [based on carriers' Annual Reports M filed with the ICC], Summary Table I, Column 7; Section I-IV, Line 45—Net Carrier Operating Income.

The competitive impact of discriminatory state taxes such as the Arkansas HUE tax—both in terms of competition with locally based carriers and in terms of intermodal competition in the long haul freight business—is a matter of grave concern. In the highly competitive environment in which they operate, interstate motor carriers are especially vulnerable to increased costs resulting from discriminatory taxes. Competition also requires flexibility and deference to customer needs. Because the vagaries of demand make it extremely difficult for carriers to predict where trucks will be needed or what routes they will have to take, it is virtually impossible for interstate carriers to control their level of highway use in any one state in an effort to avoid or mitigate the impact of such taxes.

In these circumstances, interstate motor carriers of all kinds have no choice but to pay the discriminatory highway taxes that an increasing number of states are exacting. Vigorous enforcement of the Commerce Clause, as in the present challenge, represents the carriers' only potential salvation from these costly, unconstitutional state taxes.

ARGUMENT

I. ARKANSAS' HIGHWAY USE EQUALIZATION TAX IMPOSES A PER-MILE COST ON OUT-OF-STATE MOTOR CARRIERS SEVERAL TIMES THE COST IT IMPOSES ON THEIR IN-STATE COMPETITORS.

Appellants challenge the validity under the Commerce Clause of Arkansas' HUE tax, an annual $175-per-truck/5¢-per-mile highway tax. On its face, the HUE tax applies both to trucks registered in Arkansas and to trucks registered outside the State. However, this Court has consistently held that in reviewing a Commerce Clause challenge to a state tax, "[t]he principal focus must be the *practical operation* of the statute, since the validity of state laws must be judged chiefly in terms of their *probable effects*." *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 37 (1980) (emphasis added). The practical effects of the HUE tax and other highway use taxes can be determined by examining the relative costs per mile traveled in the taxing state for out-of-state, versus in-state, motor carriers. As discussed below, under such an analysis, the HUE tax discriminates heavily in favor of locally based carriers and therefore violates the Commerce Clause.

Record evidence from Arkansas' own tax records shows that, on a classwide basis, the HUE tax imposes a far higher cost per mile on trucks registered outside Arkansas than on trucks registered in the State. (J.S. 4) To determine whether the tax discriminates against the carrier *amici* individually, each has compared its own tax cost per mile (for its fleet of trucks registered outside Arkansas) with the tax cost per mile for the average Arkansas-registered motor carrier. The *amici* performed the same comparison for Pennsylvania's former $25-per-truck marker fee and current $36-per-axle tax, both of which are under Commerce Clause challenge in a contemporane-

ous appeal.[2] *American Trucking Associations, Inc. v. Scheiner*, 55 U.S.L.W. 3175 (U.S., appeal docketed Sept. 3, 1986) (No. 86-357).

Table I below presents these comparisons, and demonstrates the blatantly discriminatory impact of the Arkansas and Pennsylvania taxes.[3] The tax cost-per-mile differentials set forth in Table I add up quickly to huge dollar amounts of discrimination. Table II shows how much excess tax the carrier *amici* are compelled to pay as a result of the non-mileage proportioned highway taxes under challenge in this appeal and *Scheiner*.

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[2] The "average tax cost per mile" figures for the Arkansas-registered and Pennsylvania-registered carriers, set forth in Table I *infra*, are derived from statistical evidence in this case (PX 38: Arkansas-registered trucks averaged 17,770 miles in-state during calendar year 1982, a figure which, when divided into the annual HUE tax of $175 per truck, yields a tax cost per mile of approximately 1.0¢) and in appellants' contemporaneous challenge to two Pennsylvania highway taxes. *American Trucking Associations v. Scheiner*, 509 A.2d 838 (Pa.), *appeal docketed* (U.S., filed Sept. 3, 1986) (No. 86-357) (Pennsylvania-registered trucks averaged 25,857 miles in-state during calendar year 1981 (PX 12), a figure which, when divided into the annual marker fee of $25 per truck, yields a tax cost per mile of 0.10 cents and, when divided into the annual axle tax of $180-per-(5-axle) truck, yields a tax cost per mile of 0.70 cents).

[3] The data in Table I for Yellow Freight, North American Van Lines, and B. I. Transportation were computed on the basis of taxes paid in Arkansas for the tax year ended June 30, 1985, and in Pennsylvania for the tax year ended March 31, 1983 (marker fee) and March 31, 1985 (axle tax).

TABLE I—*Level of Discrimination*

A Comparison of Interstate Motor Carrier Amici's Tax Cost Per Mile With That of Carriers Registered in the Taxing State

STATE	ARKANSAS	PENNSYLVANIA	PENNSYLVANIA
Type and Amount of Tax	$175 HUE Tax	$25 Marker Fee	$36 Per Axle Tax
CARRIERS REGISTERED IN TAXING STATE			
Average Tax Cost Per Mile	1.00 cents	0.10 cents	0.70 cents
YELLOW FREIGHT SYSTEM			
Tax Paid	$293,094	$53,975	$630,516
In-State Miles Traveled	5,861,881	21,513,335	35,154,130
Tax Cost Per Mile	5.0 cents	0.25 cents	1.79 cents
Ratio to In-State Carrier's Tax Cost	**5 to 1**	**2.5 to 1**	**2.6 to 1**
NO. AMERICAN VAN LINES			
Tax Paid	$387,669	$157,675	$867,810
In-State Miles Traveled	7,753,380	N/A	26,549,633
Tax Cost Per Mile	5.0 cents	N/A	3.27 cents
Ratio to In-State Carrier's Tax Cost	**5 to 1**	**N/A**	**4.7 to 1**
B. I. TRANSPORTATION			
Tax Paid	$14,700	$9,300	$31,221
In-State Miles Traveled	823,662	763,182	999,446
Tax Cost Per Mile	1.78 cents	1.22 cents	3.12 cents
Ratio to In-State Carrier's Tax Cost	**1.8 to 1**	**12.2 to 1**	**4.5 to 1**

TABLE II—*Cost of Discrimination*

A Projection of Amici's Tax Liability at Average Cost Per Mile Paid
by In-State Registered Carriers and a Calculation of Excess Tax Paid

State & Tax	Ark. HUE Tax	Pa. Marker Fee	Pa. Axle Tax
Tax Cost Per Mile	1.00 cents	0.10 cents	0.70 cents
YELLOW FREIGHT SYSTEM			
Tax Paid	$293,094	$ 53,975	$630,516
Tax Due At In-State Cost Per Mile	$ 58,619	$ 21,513	$246,079
Excess Tax Paid	**$234,475**	**$ 32,462**	**$384,437**
NO. AMERICAN VAN LINES			
Tax Paid	$387,669	$157,675	$867,810
Tax Due At In-State Cost Per Mile	$ 77,534	N/A	$185,847
Excess Tax Paid	**$310,135**	**N/A**	**$681,963**
B. I. TRANSPORTATION			
Tax Paid	$ 14,700	$ 9,300	$ 31,221
Tax Due At In-State Cost Per Mile	$ 8,237	$ 763	$ 6,996
Excess Tax Paid	**$ 6,463**	**$ 8,537**	**$ 24,225**

As Table I demonstrates, the interstate carrier *amici* are being forced to pay effective tax rates of 1.8 to 12.2 times their in-state counterparts'. As depicted in Table II, this rate differential results in the *amici* paying hundreds of thousands of dollars in excess taxes.[4]

The burden associated with each state's discriminatory highway tax is exacerbated when such taxes are levied by many states. "[I]f [Arkansas] can impose such burdens, so can every other State," thereby compounding "the resulting impediments on the free conduct of . . . interstate business." *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753, 759 (1967). *See also Armco, Inc. v. Hardesty*, 467 U.S. 638, 644 (1984) (a state tax must be such that "if applied by every jurisdiction, there would be no impermissible interference with free trade"); *Capitol Greyhound Lines v. Brice*, 339 U.S. 542, 557 (1950) (Frankfurter, J., dissenting) ("an interstate carrier will be subject to privilege taxes of several states, even though his entire use of the highways is not significantly greater than that of intrastate operators").

Already, seven states levy some form of annual non-mileage proportioned highway tax: Arkansas ($175 per truck), Indiana ($50 per truck), Kentucky ($150 per truck), Maryland ($25 per truck), New Jersey ($25 per truck), Pennsylvania ($36 per axle, amounting to $180 per truck for most interstate vehicles), and Vermont

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[4] *Amici* recognize that if Arkansas and Pennsylvania sought to raise the same amount of revenue by a non-discriminatory tax proportioned to highway use rather than by their existing discriminatory taxes, the uniform tax cost per mile would be somewhere between the high rate now paid by trucks registered outside those states and the low rate paid by the in-state carriers. The savings to *amici* from such a revenue-neutral, non-discriminatory tax, while substantial, would be somewhat less than the amounts shown in Table II. The figures in that Table, however, are revealing in that they reflect the magnitude of the disadvantage suffered by *amici* compared to their Arkansas-registered and Pennsylvania-registered competitors.

($50 per truck).[5] The potential burden on interstate commerce from the spread of these discriminatory state taxes is staggering. *Amici* Yellow, North American, and Burlington all engage in nationwide operations, and thus are vulnerable to discriminatory impositions by all 48 contiguous states and the District of Columbia. If all 49 jurisdictions levied taxes like Arkansas' HUE tax, and the *amici* had the same level of operations in each jurisdiction as they have in Arkansas, Yellow would face over $11.4 million in excess taxation, North American over $15.1 million, and Burlington over $300,000.

When the challenged taxes' discriminatory effects are extrapolated to the interstate trucking industry as a whole, the burdening of interstate commerce is enormous. In view of the potentially grave adverse effects on interstate commerce of parochial legislation such as the Arkansas HUE tax and the Pennsylvania axle tax and marker fee, this Court should give plenary consideration to the issues raised by ATA's appeals.

II. FUEL TAXES—A NON-DISCRIMINATORY FORM OF STATE HIGHWAY TAXATION—PROVIDE A READY ALTERNATIVE TO TAXES NOT PROPORTIONED TO MILEAGE.

The discrimination suffered by interstate carriers is all the more egregious because Arkansas and Pennsylvania could easily avail themselves of an alternative method of highway taxation that is proportioned to each carrier's actual miles traveled in the state. All states, including Arkansas and Pennsylvania, already levy fuel sales and use taxes that are directly related to a taxpay-

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[5] Ark. Stat. Ann. §§ 75-817.2, 75-817.3(a)(3), (4) and (5) (Supp. 1985). Ind. Code Ann. § 6-6-8 (Burns Supp. 1986); Ky. Rev. Stat. Ann. § 138.660(4)-(7) (Supp. 1986); Md. Transp. Code Ann. § 13-423(a) (1984); N.J. Stat. Ann. § 54.39 A-10 (West Supp. 1986); Pa. Cons. Stat. Ann. tit. 75 § 2102 (Purdon 1981); Pa. Cons. Stat. Ann. tit. 75, § 9901 *et seq.* (Purdon Supp. 1986); Vt. Stat. Ann. tit. 23, §§ 415, 3007, 3010 (1978 and Supp. 1985), *as amended by* 1985 (Adj. Sess.), No. 124 (1986).

er's level of highway use.[6] If maintenance requirements justify a rise in Arkansas' or Pennsylvania's highway tax revenues, those states could simply increase their existing fuel taxes. Given the availability of this constitutionally valid alternative, there is no justification for the discriminatory taxes under challenge here and in *Scheiner*. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (a state action violates the Commerce Clause where "the local interest" [here, the raising of highway tax revenues] "could be promoted as well with a lesser impact on interstate activities").

CONCLUSION

To halt the states' harmful attempts to protect local interests and export their highway tax obligations, this Court should note probable jurisdiction in this appeal and *Scheiner*, and strike down the challenged taxes under the Commerce Clause.

Respectfully submitted,

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[6] *See* Ark. Stat. Ann. §§ 75-1106, 75-1150, 75-1241, 75-1251, 75-1269 (Repl. 1979); 75-1278 (Supp. 1985) and 72 Pa. Cons. Stat. Ann. §§ 2611a *et seq.*, 2614.1 *et seq.*, 2617.1 *et seq.* (Purdon 1964). The more miles a truck is driven in a state, the more gallons of fuel it consumes and the more tax is paid on the fuel. Pennsylvania also apportions its corporate income tax, when levied on interstate carriers, according to the carrier's total miles traveled in the state. *See* 72 Pa. Cons. Stat. Ann. § 7401(3)2(b) (Purdon Supp. 1986).